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|-----------------|-------------|----------------------|---------------------|------------------|
| 09/415,696      | 10/12/1999  | DONALD K. WRIGHT     | 21276-9044          | 5181             |

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EXAMINER

PASCUA, JES F

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3727

DATE MAILED: 07/02/2002

Please find below and/or attached an Office communication concerning this application or proceeding.



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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

Paper No. 19

Application Number: 09/415,696  
Filing Date: October 12, 1999  
Appellant(s): WRIGHT ET AL.

Robert S. Beiser  
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed June 17, 2002.

**(1) *Real Party in Interest***

A statement identifying the real party in interest is contained in the brief.

**(2) *Related Appeals and Interferences***

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

**(3) *Status of Claims***

The statement of the status of the claims contained in the brief is incorrect. A correct statement of the status of the claims is as follows:

This appeal involves claims 1, 4-10, 18 and 19.

Claims 13-17 and 21 have been withdrawn from consideration as not directed to the elected invention.

Claims 2, 3, 11, 12 and 20 have been canceled.

**(4) *Status of Amendments After Final***

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

**(5) *Summary of Invention***

The summary of invention contained in the brief is correct.

**(6) *Issues***

The appellant's statement of the issues in the brief is correct.

**(7) *Grouping of Claims***

The rejection of claims 1, 4-10, 18 and 19 stand or fall together because appellant's brief does not include a statement that this grouping of claims does not stand or fall together and reasons in support thereof. See 37 CFR 1.192(c)(7).

**(8) Claims Appealed**

The copy of the appealed claims contained in the Appendix to the brief is correct.

**(9) Prior Art of Record**

|           |                  |         |
|-----------|------------------|---------|
| 4,589,145 | VAN ERDEN et al. | 5-1986  |
| 5,024,537 | TILMAN           | 6-1991  |
| 5,071,689 | TILMAN           | 12-1991 |

**(10) Grounds of Rejection**

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1, 4-10, 18 and 19 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Van Erden et al. '145. This rejection is set forth in prior Office Action, Paper No. 10.

Claims 1, 4, 6-8, 10, 18 and 19 are rejected under 35 U.S.C. 102(b) as clearly anticipated by Tilman '537. This rejection is set forth in prior Office Action, Paper No. 10.

Claims 1, 5, 6, 8 and 10 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Tilman '689. This rejection is set forth in prior Office Action, Paper No. 10.

**(11) Response to Argument**

The declarations under 37 CFR 1.132 filed 4/16/02 is insufficient to overcome the rejection of claims 1, 4-10, 18 and 19 based upon 35 USC 102(b) as set forth in the last Office action because: the first declaration by appellants fails to compare the claimed subject matter with the closest prior art. In Exhibit I, the chart shows that appellant's

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bag with a compression molded fastener (which is formed by heat and pressure) is compared to a bag with a fastener having spot seals (which were formed by ultra-sonic waves). Appellant's first declaration is silent as to why prior art bags using ultra-sonic sealers to form spot seals were selected for the comparison instead of prior art bags using heat and pressure to form spot seals. The second declaration (which discusses Exhibits II-V) is also insufficient to overcome the rejection of claims 1, 4-10, 18 and 19 based upon 35 USC 102(b) as set forth in the last Office action because: the declaration is absent any factual support for the expert opinion and the expert's interest in the outcome of the case gives the declaration bias against the prior art.

With regard to appellant's argument that Van Erden et al. '145, Tilman '537 and Tilman '689 cannot anticipate claim 1, all the references cited in the rejection show: 1) a "fused section of the first and second profile strips" (spot seal 47 in Van Erden et al. '145, spot seal 23 in Tilman '537, combination end seal and hinge area 21 in Tilman '689), 2) the fused section being "substantially flattened" (column 7, lines 16-17 of Van Erden et al. '145 discloses, "seals 47 reduce the thickness of material layers", column 2, lines 57-58, Tilman '537 discloses, "spot seals 23 which flatten the profile areas", column 3, lines 7-8 of Tilman '689 discloses "hinge area 21 in each instance is desirably of a sufficient thinness"), 3) "an airtight seal" (Van Erden et al. '145, Tilman '537 and Tilman '689 each disclose a seal as discussed above and Webster's New World Dictionary, Third College Edition defines seal as "a tight closure, against the passage of air or water") and 4) "without distorting the ribs of the first and second profile strips **outside** of the fused section" [emphasis added] (the profile strips of Van Erden et al.

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'145, Tilman '537 and Tilman '689 are disclosed as being openable and reclosable, so it stands to reason that the portions of the profiles outside the spot seals are without distortion).

The Examiner maintains that the citation of In re Thorpe is still applicable to the present application for the reasons set forth in the Final Office action. Appellant's pointing out of specific structure to differentiate the compression molded seals from the prior art is contradicts the arguments presented in the response filed 8/8/01. In that response, appellant argues that it is the method forming the compression molded seals that distinguishes it from spot seals.

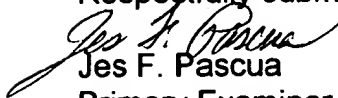
Appellant argues that it is improper to find the product of claim 1 is the same as, or anticipated by, the product of the prior art when the record includes unrebutted and unopposed expert opinion evidence and experimental evidence that the products are distinguishable by their performance in maintaining an airtight seal. Appellant's expert opinion is unsupported by factual evidence and biased. Appellant's experimental evidence fails to compare the closest prior art as discussed above.

For the above reasons, it is believed that the rejections should be sustained.

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Respectfully submitted,

  
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June 26, 2002

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